

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

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In re	)	Chapter 9
	)	
CITY OF DETROIT, MICHIGAN	)	Case No.: 13-53846
	)	
Debtor.	)	Hon. Steven W. Rhodes
	)	
	)	
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**CITY OF DETROIT’S BRIEF SUPPORTING  
THE ADMISSION OF THE REPORT OF  
COURT-APPOINTED EXPERT, MARTHA E. M. KOPACZ**

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The City of Detroit, Michigan (the “City”) submits this brief supporting the admission of the report of court-appointed expert, Martha E. M. Kopacz, into evidence, and respectfully states as follows:

**INTRODUCTION**

1. Martha E. M. Kopacz is a Senior Managing Director with Phoenix Management Services, LLC. On April 22, 2014, the Court appointed Ms. Kopacz as an independent expert to “investigate and reach a conclusion on: (a) Whether the City’s plan is feasible as required by 11 U.S.C. § 943(b)(7); and (b) Whether the assumptions that underlie the City’s cash flow projections and forecasts regarding its revenues, expenses and plan payments are reasonable.” Order Appointing Expert Witness (Docket #4215). This appointment followed the Court’s search for an expert with “outstanding qualifications” in municipal finance, budgeting, and

planning who “[i]s able to give an opinion that is based on sufficient facts or data and that is the product of reliable principles and methods and the application of those principles and methods to the case.” Order Regarding the Solicitation of Applications (Docket #3610).

2. Ms. Kopacz and a team of assistants accomplished this task by conducting an extensive, months-long investigation and review of the Plan and its underlying financial projections. This comprehensive study entailed conducting hundreds of interviews with key personnel and stakeholders; reviewing and analyzing documents relating to the City’s Plan and finances, as well as the City’s data and third-party information; and critiquing the methodology, data, and information underlying the City’s financial projections.

3. Based on this searching review, Ms. Kopacz concluded that the Plan is feasible and that its underlying financial projections are reasonable. *See* Kopacz Report at 10. Her 226-page expert report submitted on July 18, 2014 sets forth in careful and thorough detail the bases for these conclusions.

4. As explained below, Ms. Kopacz’s extensive report should be admitted into evidence to explain the bases of her opinions, a permissible purpose under the Federal Rules of Evidence and the rule against hearsay. *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728–29 (6th Cir. 1994). Such admission will serve judicial economy in this lengthy trial by streamlining the Court’s direct

examination of Ms. Kopacz and aiding the Court in navigating the extensive evidence.

## **ARGUMENT**

### **I. MS. KOPACZ’S EXPERT REPORT IS ADMISSIBLE.**

5. The Sixth Circuit and other courts have held that an expert report is “hearsay” that may not be used as a vehicle to admit otherwise inadmissible evidence “for the truth of the matter” asserted. *See Engebretsen*, 21 F.3d at 728; *see also* Syncora Br. In Opp. To The Admissibility Of The Expert Report Of Martha E.M. Kopacz ¶¶ 8–11 (Docket #6800). Nonetheless, the Sixth Circuit has directed that the report of a testifying expert is admissible as a roadmap “to explain the basis of the expert’s opinion,” even if it includes hearsay or other inadmissible evidence relied upon by the expert. *Engebretsen*, 21 F.3d at 728–29 (quoting *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261–62 (9th Cir. 1984)).<sup>1</sup> As the Sixth Circuit has explained, Rules 702 and 703 “carve out” an exception to the rule against the admission of hearsay by authorizing the admission of underlying facts and data “for explanatory purposes.” *Id.* at 729; *see also Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983) (“An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his

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<sup>1</sup> *See also Lewis v. Rego Co.*, 757 F.2d 66, 73–74 (3d Cir. 1985) (finding basis for expert’s opinion admissible); *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 552–53 (7th Cir. 1980) (same); *Eaves v. United States*, 2009 WL 3754176 (W.D. Ky. Nov. 5, 2009) (similar).

expert opinion.”).

6. The Sixth Circuit’s holding comports with the rules governing expert testimony. For example, in formulating her opinions, an expert may rely on materials outside the record—including otherwise inadmissible materials—so long as “experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” Fed. R. Evid. 703. A court may even allow the expert to testify regarding such inadmissible materials for the purposes of explaining how the expert reached her opinions and of “assisting the [factfinder] in evaluating [the] expert’s opinion.” Advisory Committee’s Notes on Fed. Rule Evid. 703, 28 U. S. C. App., p. 361.

7. At the same time, an expert may offer opinion testimony “without first testifying to the underlying facts or data.” Fed. R. Evid. 705. In fact, direct examination need not probe the bases of the expert’s opinion *at all* because the Federal Rules “place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel’s cross-examination.”” *In re John Richards Homes Bldg. Co.*, 439 F.3d 248, 264 (6th Cir. 2006) (quoting *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980)); *see also id.* (“[A]n opposing party who would challenge the facts underlying the expert’s opinion must do so by cross-examination.”).<sup>2</sup>

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<sup>2</sup> *See also Int’l Adhesive Coating Co., Inc. v. Bolton Emerson Int’l, Inc.*, 851

8. Admission of Ms. Kopacz's expert report would serve both of these purposes—and, in fact, give the Court the best of both worlds. Under this scenario, the Court would have Mr. Kopacz's report available as a roadmap to “explain,” and to assist the Court in evaluating, her opinions and conclusions. *Engbreetsen*, 21 F.3d at 729. Moreover, as this Court has recognized, admission of the report would permit the Court to streamline its direct examination to the key elements of Mr. Kopacz's opinions, and to forego examining her regarding the bases and explanations for those opinions already contained in her report. 8/6/2014 Hrg. Tr. at 15 (“[T]he reason why I would promote this to you is that it seems logical that if her report is in evidence, the direct examination of her will be much more expeditious than if her report is not in evidence.”) (Ex. A). And, of course, Ms. Kopacz will be subject to cross-examination by adverse parties who wish to explore “the facts and assumptions underlying” her conclusions. *In re John Richards Homes Bldg. Co.*, 439 F.3d at 264.

9. Thus, contrary to Syncora's argument, *see* Syncora Br. In Opp. To The Admissibility Of The Expert Report Of Martha E.M. Kopacz ¶¶ 8–11, the rule

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F.2d 540, 545 (1st Cir. 1988) (“[I]f in arriving at his opinion the expert has reasonably relied on facts or data before trial, the basis for the opinion need not be disclosed as a condition to admitting the testimony. The burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion.”); *Lewis*, 757 F.2d at 74 (“Although it is not required that the bases for experts' opinions be disclosed before an opinion is given, the bases of an opinion may be testified to on direct examination and, if inquired into on cross-examination, must be disclosed.”).

against hearsay does not foreclose admission of Ms. Kopacz's report here. In the first place, the Sixth Circuit has made clear that, *notwithstanding* the hearsay rule, an expert report—including any inadmissible evidence it contains—is admissible “to explain the basis of the expert’s opinion.” *Engbreetsen*, 21 F.3d at 729 (internal quotation marks omitted).

10. Moreover, as explained, Ms. Kopacz will be subject to cross-examination, which is the appropriate method for adverse parties to “challenge the facts underlying [her] opinion.” *In re John Richards Homes Bldg.*, 439 F.3d at 264; *see also United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993) (“Where an adversary party has full opportunity to refute an expert’s testimony during cross-examination, exclusion due to the danger of misleading the [factfinder] is generally inappropriate.”).

11. Finally, this is a bench trial, so there is no risk of misleading or confusing a jury. The Court’s traditional discretion “in the matter of the admission or exclusion of expert evidence,” *United States v. Jones*, 107 F.3d 1147, 1152 (6th Cir. 1997) (internal citation and quotation marks omitted), “is particularly broad in a bench trial,” *United States v. Demjanjuk*, 367 F.3d 623, 633 (6th Cir. 2004). ““When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.””

*Ambrose v. Roeckeman*, 749 F.3d 615, 621 (7th Cir. 2014) (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) (plurality op.)); *see also Williams*, 132 S. Ct. at 2234–35 (plurality op.) (“In bench trials, . . . the Federal Rules place no restriction on the revelation of such information to the factfinder.”).<sup>3</sup>

12. Thus, governing Sixth Circuit law permits the Court to advance judicial economy and to streamline the trial by admitting Ms. Kopacz’s report as a roadmap “to explain the basis of [her] opinion.” *Engbretsen*, 21 F.3d at 729.

## **II. MS. KOPACZ’S THOROUGH REPORT WILL BE HELPFUL TO THE COURT.**

13. Admission of Ms. Kopacz’s comprehensive report will aid the Court in navigating the voluminous evidence and in understanding the crucial questions presented in this case. The Court sought an expert with “outstanding qualifications” in municipal finance, budgeting, and planning who “[i]s able to give an opinion that is based on” sufficient facts and data and reliable methodology. Order Regarding the Solicitation of Applications. The Court appointed Ms. Kopacz from among the pool of several seemingly well-qualified applicants and ordered her to “investigate and reach a conclusion on” whether the Plan is feasible and whether the City’s financial assumptions are reasonable. Order

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<sup>3</sup> Rule 703’s balancing test weighing the “probative value” of inadmissible evidence against its “prejudicial effect” applies only to disclosure to a jury and, thus, is inapplicable here. Fed. R. Evid. 703; *Ambrose*, 749 F.3d at 621 (Rule 703 limits “the admissibility of such evidence only as to juries”).

Appointing Expert Witness (Docket #4215).

14. Ms. Kopacz is eminently well-qualified to opine on these matters of municipal finance, budgeting, and planning. She has extensive experience in assisting stakeholders in analyzing business operations and reorganization possibilities. *See* Kopacz Report at Ex. 1. Ms. Kopacz “has led or participated in over 100 consulting and restructuring engagements representing companies, debtors, investors, creditor committees, banks and Chapter 11 Trustees.” *Id.* Ms. Kopacz has also “prepared dozens of financial projections for clients and reviewed and critiqued dozens more, prepared by others.” *Id.*

15. Ms. Kopacz’s opinions rest on sufficient facts and data and reflect a reliable methodology. Indeed, Ms. Kopacz’s 226-page report itself bears the hallmarks of a well-conceived and carefully executed investigation and analysis into the issues that the Court directed her to consider. Ms. Kopacz and her team “conducted more than two hundred interviews and fact gathering meetings” with stakeholders and other individuals with knowledge, including elected and appointed officials, the City’s Emergency Manager, City employees, and retained advisors, among others. *Id.* at 4, 10.

16. In addition to the interviews, Ms. Kopacz and her team conducted an extensive analytical review of the methodology and assumptions underlying the City’s financial projections. *See id.* at 4–5. To this end, the team reviewed and



analyzed documents relevant to the City's plan and financial projections, as well as City data and third-party information, which provided additional background and perspective on the City's finances. *Id.* The team followed review of this information with additional questions and requests for information from the City, its advisors, and other stakeholders. *Id.* at 5. In the course of this iterative process, Ms. Kopacz's team obtained and reviewed a vast array of documents relevant to the City's projections. *See id.* at Ex. 2.

17. Ms. Kopacz's report documents in detail the facts, materials, methods, and other bases for her opinions that the City's Plan is feasible and that its underlying financial assumptions are reasonable. Admitting Ms. Kopacz's report therefore will aid the Court in resolving those linchpin questions, without burdening the Court with a protracted direct examination in this already lengthy trial.

WHEREFORE, for the foregoing reasons, the Court should admit Ms. Kopacz's expert report.

Dated: August 18, 2014

Respectfully submitted,

Bruce Bennett (CA 105430)  
JONES DAY  
555 South Flower Street  
Fiftieth Floor  
Los Angeles, California 90071  
Telephone: (213) 243-2382  
Facsimile: (213) 243-2539  
bbennett@jonesday.com

David G. Heiman (OH 0038271)  
Heather Lennox (OH 0059649)  
JONES DAY  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212  
dgheiman@jonesday.com  
hlennox@jonesday.com

Thomas F. Cullen, Jr. (DC 224733)  
Gregory M. Shumaker (DC 416537)  
Geoffrey S. Stewart (DC 287979)  
JONES DAY  
51 Louisiana Ave., N.W.  
Washington, D.C. 20001  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
tfcullen@jonesday.com  
gshumaker@jonesday.com  
gstewart@jonesday.com

/s/ Deborah Kovsky-Apap  
Robert S. Hertzberg (P30261)  
Deborah Kovsky-Apap (P68258)  
PEPPER HAMILTON LLP  
4000 Town Center, Suite 1800  
Southfield, Michigan 48075  
Telephone: (248) 359-7300  
Facsimile: (248) 359-7700  
hertzbergr@pepperlaw.com  
kovskyd@pepperlaw.com

ATTORNEYS FOR THE CITY OF DETROIT

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 18, 2014, I electronically filed the foregoing *City of Detroit's Brief Supporting the Admission of the Report of Court-Appointed Expert, Martha E. M. Kopacz* with the Clerk of the Court, which sends notice by operation of the Court's electronic filing service to all ECF participants registered to receive notice in this case.

Dated: August 18, 2014

/s/ Deborah Kovsky-Apap  
Deborah Kovsky-Apap (P68258)

# **EXHIBIT A**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
 . Detroit, Michigan  
 . August 6, 2014  
Debtor. . 9:00 a.m.  
 . . . . .

HEARING RE. STATUS CONFERENCE RE. PLAN CONFIRMATION  
PROCESS (#6376) SIXTH AMENDED ORDER ESTABLISHING  
PROCEDURES, DEADLINES AND HEARING DATES RELATING TO  
THE DEBTOR'S PLAN OF ADJUSTMENT  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day  
By: HEATHER LENNOX  
222 East 41st Street  
New York, NY 10017  
(212) 326-3837  
  
Jones Day  
By: THOMAS CULLEN  
GREGORY SHUMAKER  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
(202) 879-3939  
  
For National Public Finance  
Guarantee Corp.: Sidley Austin, LLP  
By: GUY NEAL  
1501 K Street, N.W.  
Washington, DC 20005  
(202) 736-8041  
  
For Assured Guaranty Municipal  
Corp.: Chadbourne & Parke, LLP  
By: ROBERT SCHWINGER  
30 Rockefeller Plaza  
New York, NY 10112  
(212) 408-5364  
  
For the Official  
Committee of  
Retirees: Dentons US, LLP  
By: SAM J. ALBERTS  
1301 K Street, NW, Suite 600, East Tower  
Washington, DC 20005  
(202) 408-7004

1 that the city will effectively be, you know, laying the  
2 foundation for with respect to things like forecasts and  
3 pensions, and I think it may be a little bit harder both for  
4 any parties either to cross her or examine her until there's  
5 been a little more of the sort of working familiarity that  
6 comes with taking testimony from others on those issues.

7 THE COURT: Um-hmm.

8 MR. HACKNEY: So for what it's worth, I think my  
9 view would still be to do her after the city has put all the  
10 evidence in, but the --

11 THE COURT: Does it address your concerns to make  
12 her available for further or extended cross-examination after  
13 the city's case?

14 MR. HACKNEY: Yeah, it might. I guess I was really  
15 thinking not so much as a tactician from my own client's  
16 narrow perspective but just more generally from the process  
17 standpoint I think that I offer you that view.

18 THE COURT: All right. Well, let me think about  
19 this one then without resolving it at this point. Okay. So  
20 the next issue is the admissibility or the admission of her  
21 report into evidence, and the reason why I would promote this  
22 to you is that it seems logical that if her report is in  
23 evidence, the direct examination of her will be much more  
24 expeditious than if her report is not in evidence because if  
25 her report is not in evidence, then the substance of it will

1 have to be brought out virtually entirely through  
2 examination, whereas if the report is in evidence, I can just  
3 focus on the questions I have for her, so can we have an  
4 agreement to admit her report into evidence?

5 MR. CULLEN: No objection from the city, your Honor.  
6 I agree with the -- and I agree with the rationale that  
7 otherwise we'd go through a long process. The middle  
8 alternative is she could offer the report, say, "Is this your  
9 report? Do you still stand by it?" et cetera, and then we  
10 could do -- offer that into evidence on that basis, but I  
11 think having it into evidence to start with simplify the  
12 procedure a lot.

13 MR. HACKNEY: So, your Honor, regrettably, we don't  
14 share the view. We're not able at this time to stipulate  
15 either to her credentials or to the admission of her report,  
16 but what I did want to suggest today was that I thought to  
17 the extent you haven't already read her report -- I think it  
18 sounds like that you have read her report, that you had a  
19 copy of it.

20 THE COURT: Oh, yes.

21 MR. HACKNEY: Yes. I do think it would be useful  
22 for the Court to have read her report, as you have, and to  
23 read her deposition, and we don't have an objection with the  
24 Court reading her deposition. The transcript is available,  
25 and we can get it to you as soon as you'd like.



1 THE COURT: Um-hmm.

2 MR. HACKNEY: But we have questions about the  
3 admissibility of her opinion testimony that I think we're  
4 going to be raising with you, so I'm not able to stipulate to  
5 that, and I apologize. I understand it would be  
6 streamlined --

7 THE COURT: All right, but no apology necessary.  
8 Okay. So that answers Question D, which is in regard to the  
9 stipulation to her qualifications as an expert; is that  
10 right? What were you going to say, sir? I'm sorry.

11 MR. SOTO: Your Honor, the same goes with respect to  
12 FGIC. We're considering some aspects of the report -- and,  
13 again, it's highlighted in the testimony that Mr. Hackney is  
14 referring to -- that may be portions of a motion in limine  
15 and maybe even some other motions. That's the reason why we  
16 agree.

17 THE COURT: Okay.

18 MR. CULLEN: Your Honor, if I may, Cullen, again,  
19 for the city. It is possible -- we would stipulate the  
20 report in, but it is possible if the Court is going to read  
21 the deposition on which the challenge to her qualifications  
22 and opinions might have rested and has already read the  
23 report, it might be -- it might be more expeditious if it  
24 can't be stipulated for the Court to just decide on that. It  
25 could be offered into evidence, and the Court could make a

1 decision on whether or not -- whether or not it would be  
2 admitted into evidence based upon a short motion or something  
3 like that.

4 THE COURT: Well, let's process this logically. If  
5 there are objections to her qualifications or methodologies  
6 or other Daubert kinds of issues, then those should be  
7 processed before the issue of the admissibility of the report  
8 itself. I know there's a dispute in the case law on whether  
9 reports of experts are inadmissible hearsay or are admissible  
10 when the witness is available to be cross-examined on it at  
11 trial, and I suppose I could ask you to brief those issues.  
12 Mr. Hackney, was it your intent -- or let me just ask the  
13 creditors generally. Was it the intent of anyone to file a  
14 Daubert motion in relation to Ms. Kopacz and her testimony?

15 MR. HACKNEY: So that is something, your Honor -- as  
16 you know, we have been doing a lot of different things  
17 lately, and it's moving at quite a pace, but I will say  
18 that's something that's under active consideration, so --

19 THE COURT: Okay. Well, we probably don't need an  
20 answer to that question now, but the sooner the better.

21 MR. HACKNEY: Yeah. That's one of the --

22 THE COURT: When is our final pretrial conference at  
23 this point?

24 THE CLERK: The 19th.

25 THE COURT: The 19th, so that's in a little less

1 than a couple of weeks.

2 MR. HACKNEY: I wonder if a way to stage this, your  
3 Honor, is to sort of go in pieces, which is it seems like  
4 there's a general agreement that you can read her report and  
5 her deposition. Then we can suss out whether we'll be  
6 bringing motion practice against her that will allow you to  
7 further refine your views on what she did, and then perhaps  
8 that will feed into --

9 THE COURT: Um-hmm.

10 MR. HACKNEY: -- when you want her to testify and --

11 THE COURT: Okay.

12 MR. HACKNEY: -- how you'll resolve some of the --

13 THE COURT: That's a good point. Does anyone object  
14 to the Court reviewing Ms. Kopacz's deposition at this point  
15 in time? All right. Then I will accept your offer,  
16 Mr. Hackney, to make that transcript available to me at your  
17 earliest convenience.

18 MR. HACKNEY: Someone listening on the phone is  
19 going to send it.

20 MS. KOPACZ: Your Honor, it's Marti Kopacz. I  
21 wanted to let the Court know as well as everybody at the  
22 hearing I do intend to file a supplemental report -- it will  
23 be very brief -- really for a couple of purposes. One is at  
24 the time that I issued my report, the fifth amended plan had  
25 just been filed, and I did not have the opportunity to read